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IN THE

Supreme Court of the United States

October Term, 1962

No. [illegible]

UNITED STATES OF AMERICA,
Petitioner,

v.

BUFFALO SAVINGS BANK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF BUFFALO SAVINGS BANK IN OPPOSITION

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BUFFALO LAW PRINTERS,
BUFFALO, N. Y.

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No. 922

UNITED STATES OF AMERICA,

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v.

BUFFALO SAVINGS BANK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF BUFFALO SAVINGS BANK IN OPPOSITION

Opinions Below

The first opinion of the Erie County Court is reported in 186 N. Y. S. 2d 960, 17 Misc. 2d 564 (R. 68-75). The first opinion of the New York Supreme Court, Appellate Division, Fourth Department, is reported at 202 N. Y. S. 2d 70, 11 A. D. 2d 158 (R. 40-44). The second opinion of the Erie County Court is reported at 206 N. Y. S. 2d 518, 26 Misc. 2d 443 (R. 29-39). The second opinion of the New York Supreme Court, Appellate Division, Fourth Department, is reported at 215 N. Y. S. 2d 189, 13 A. D.

2d 207 (R. 115-120). The opinion of the Court of Appeals of the State of New York is reported at 11 N. Y. 2d 31.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered February 22, 1962. The petition for a writ of certiorari was filed on April 30, 1962. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

Questions Presented

Whether the United States, when it submits to the jurisdiction of a New York Court under the provisions of Title 28 U. S. C. Section 2410 (c) (Appendix A) in a mortgage foreclosure action, is bound by the provisions of the New York Statutes which make the cost of real estate taxes and assessments paid by the referee expenses of sale, so that they are paid from the proceeds of the sale before any amount thereof is paid either to the plaintiff-mortgagee or to the United States on its federal tax lien; and further whether the United States is bound by other New York statutes as they define the mortgagor's interest in the mortgaged property after the execution of the mortgage as being subject to the right of the mortgagee to have the real estate taxes and assessments paid out of the mortgaged property; and further as said statutes define surplus monies.

Statutes Involved

Sections 3670, 3671 and 3672 (a) (1) of Title 26, U. S. C., 2410 (c) of Title 28, U. S. C., and 1652 of Title 28 U. S. C.; Sections 1082 and 4087 of the New York Civil

Practice Act; Sections 240 (2) and 290 (3) of the New York Real Property Law; General Statutes of Connecticut, Title 49, Chapter 846, Sections 49-27 and 49-29; Wisconsin Statutes, Chapter 278.10; and Sections 1626 and 1676 of the Code of Civil Procedure of the State of New York, predecessor to the New York Civil Practice Act, adopted by Chapter 178 of the Laws of 1880.

Statement

This is an action brought to foreclose a mortgage on real property. The mortgage was dated April 5, 1946, and recorded in Erie County Clerk's Office, New York, the same day (R. 58 and 61). The United States of America was made a party defendant because of a tax lien which it filed in the Erie County Clerk's Office January 15, 1953 (R. 66), subsequent to the date of the recording of plaintiff's mortgage (R. 61). The United States was made a party defendant to this foreclosure action pursuant to the provisions of Section 2410 (c) Title 28 U. S. C. (Appendix A). None of the local municipal taxing authorities is a party to the action (R. 3).

The first judgment of foreclosure and sale made by the Erie County Court June 3, 1959, foreclosed the tax lien of the United States from the mortgaged property, subject to the one year redemption period provided by 28 U. S. C. 2410 (c), and directed the referee appointed to conduct the foreclosure sale to sell the property subject to all unpaid real estate taxes and assessments pursuant to the provisions of Section 1087 of the New York Civil Practice Act (R. 50) (Appendix A). On appeal, the New York Supreme Court, Appellate Division, Fourth Department, on June 29, 1960, reversed this judgment and remanded this case to the Erie County Court (R. 46).

Subsequently, a resettled judgment of foreclosure and sale was made by the Erie County Court on October 20, 1960, which foreclosed the United States tax lien, subject to the one year redemption period provided for by 28 U. S. C. 2410 (c), and directed the referee appointed to conduct the foreclosure sale to pay the unpaid real estate taxes and assessments as expenses of the sale, pursuant to Section 1087 of the Civil Practice Act (R. 9). On appeal, the New York Supreme Court, Appellate Division, Fourth Department, by its order of May 9, 1961 (R. 108 to 114), reversed the second judgment of the Erie County Court, dated October 20, 1960 (R. 6 to 14), and directed that provisions should be inserted in the judgment providing that the referee to sell bring the entire proceeds of the sale into court, and for the court to then order a distribution of such proceeds in the manner directed in the cases, United States vs. City of New Britain, 347 U. S. 81, and Brown vs. General Laundry, 19 Conn. Supp. 335. On appeal, the Court of Appeals, State of New York, by its order of February 22, 1962, reversed the order of the Appellate Division, dated May 9, 1961, and reinstated the judgment of the Erie County Court dated October 20, 1960 (R. 6 to 14), which judgment provided for the payment of all real estate taxes and assessments as an expense of the sale before any moneys were allocated either to the plaintiff or the defendant United States of America (R. 9).

ARGUMENT

I

The New Britain case does not apply here.

The decision of the New York Court of Appeals in this matter is not in conflict with the United States vs. City of New Britain (347 U. S. 81, 98 L. Ed. 520) and the facts in this case are not four square with the facts in the New Britain case.

The mortgagee was not a party in the New Britain case. It therefore was not present and was not able to state the position that the effect of the decision was to give priority to the federal lien over the mortgage contrary to the provisions of 26 U. S. C. 3672 (Appendix A).

Furthermore, mortgage foreclosure procedure in Connecticut differs from that in New York in that in Connecticut the proceeds of a foreclosure sale are brought into Court and thereafter a supplemental judgment is rendered, specifying the parties who are entitled thereto and the amount to which each, including the plaintiff, is entitled (49 Conn. Gen. Statutes C846, Secs. 49-27, 49-29 (Appendix A), and Julia M. W. Gault vs. Jason Bacon, (142 Conn. 200), while in New York Section 1082 of the Civil Practice Act (Appendix A) provides on a default for a sale of the mortgaged premises to satisfy the mortgage debt, the expenses of sale, and the costs of the action, and all surplus moneys arising from the sale are then deposited in Court subject to further order, and Section 1087 of the New York Civil Practice Act (Appendix A), defines the payment of local taxes and assessments as an expense of the sale. Section 1082 of the New York Civil Practice Act is derived from Section 1626 of the

New York Code of Civil Procedure adopted by Chapter 522 of the Laws of New York of 1880 and Section 1087 is derived from Section 1676 of the Code of Civil Procedure adopted by Chapter 522 of the Laws of New York of 1880. Sections 1626 and 1676 of said Civil Code of Procedure, as adopted in 1880, are set forth in Appendix A.

As the New York Court of Appeals states, the local taxing authorities in this case are not competing with the United States for payment from the same fund. No question of "circular priority" arises. The local taxes will be paid as an expense of sale before the surplus from which the United States lien must be paid is created. The United States agreed to be bound by this procedure when, pursuant to 2410 (c) of the United States Code 28 (Appendix A), it submitted to the jurisdiction of the New York Courts. Section 1652 of Title 28 U. S. C. (Appendix A) makes this state law binding on the United States in a federal court. It certainly is equally binding on it in the state court.

II

The Brosnan case does apply.

All statements in the New Britain case to the effect that local taxes must come out of the mortgagee's share are *obiter dicta* and contrary to the later direct holding by this Court in U. S. v. Brosnan (363 U. S. 237, 4 L. Ed. 2d 1192), that local taxes can be paid in a foreclosure action as an expense of the sale.

New York and Connecticut foreclosure procedure, as respectively established by New York and Connecticut law, not only differ from each other but also differ from Penn-

sylvania foreclosure procedure, as described and approved of by this Court in United States vs. Brosnan, 363 U. S. 237. However, New York and Pennsylvania procedures have one thing in common, *i.e.*, the United States tax lien is foreclosed and divested from the mortgaged property without any payment on the federal lien, in a judicial foreclosure action, which also provides for the payment in full of local taxes and assessments as a part of the foreclosure action. This fact was brought to this Court's attention in the government's brief in the Brosnan case. This Court said in the Brosnan case, 363 U. S. 237, at page 242: "We believe that, so far as this Court is concerned, the need for uniformity (in the collection of federal taxes) in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures." The application of the *dicta* in the New Britain case for which the government asks, would severely upset long established property rights in New York State and put New York mortgagees in a less advantageous position than their Pennsylvania counterparts.

III

The federal lien attached to the mortgaged property subject to the mortgagee's right to have local taxes and assessments paid out of the mortgaged property.

This Court has held that a federal tax lien can attach only to the mortgagor's property interest as determined by state law. Aquilino v. United States, 363 U. S. 509; United States v. Durham Lumber Co., 363 U. S. 522. By statute in New York, a mortgage is defined as a conveyance. Real Property Law 240 (2) and 290 (3) (Appendix A). When Joseph Victory, the mortgagor in this action,

executed his mortgage to Buffalo Savings Bank, he conveyed to Buffalo Savings Bank, as mortgagee, all those rights embraced within the mortgage contract as defined by New York Law (Sections 1082 and 1087 New York Civil Practice Act). He had conveyed to the mortgagee the right to have local taxes and assessments paid and satisfied out of the mortgaged premises. It was on this diminished ownership that the federal tax lien attached.

This right in the mortgagee to have real estate taxes and assessments paid out of the mortgaged premises is a right which Congress, when it enacted 2410 (c) of 28 U. S. C., must have known that mortgagees customarily and usually possessed, as those rights are discussed by Judge Haynsworth in his dissenting opinion in U. S. v. Bond, 279 F. 2d 837, 851, 852. Furthermore, the theory of "circular priority" as urged by the government in this case, causing the mortgagee to contribute toward the payment of a tax lien it does not owe, is directly contrary to the statement in the House Committee Report at the time of the adoption of 28 U. S. C. 2410 (c) (House of Representatives Report 95, 71st Congress, 2nd Session, page 1) (Appendix A) that it was adopted to correct the then existing situation where "He (the mortgagee) is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment."

IV

The New York Court of Appeals decision is not in conflict with any federal court decisions.

The petition for certiorari states that the decision of the New York Court of Appeals conflicts with the decisions in the cases of U. S. vs. Bond, (Fourth Circuit) 279 F. (2) 837, U. S. vs. Christensen, (Ninth Circuit) 269 F. (2) 624, U. S. vs. Wasserman, (First Circuit) 257 F. (2) 491, Union Central Life vs. Peters, 361 Mich. 283, 105 N. W. (2d) 196, and First National Bank vs. Henneman Co., 10 Wisc. (2) 260, 103 N. W. (2) 24. The cases of U. S. vs. Bond, U. S. vs. Christensen and Union Central Life vs. Peters all involved advances made by a mortgagee to pay delinquent state taxes which were junior to a federal lien. When the mortgagee sought to claim a lien under his mortgage for such advances, it was held that the advances were junior to the federal tax lien. Such a situation is not presented in the present case. The mortgagee here has advanced no money for taxes. Furthermore the holdings are in conflict with the ruling of this Court in Security Mortgage Co. vs. Powers, 278 U. S. 149, 73 L. Ed. 236. Also the government has retreated from the position it took in these cases, on the requirement of choateness in a competing lien, by its concession in Crest Finance Co. vs. U. S., 368 U. S. 387, 7 L. Ed. 2d 342. The Wasserman case involved the construction of a provision of the federal bankruptcy act in a federal court and has no bearing on a case arising under state law. The case of First National Bank vs. Henneman Co. is similar to the New Britain case in that the county was a party, and the property was sold first leaving the proceeds in the custody of the court for further disposition under the competing tax liens. There is no provision in

the Wisconsin Statutes (1278 Section 10) (Appendix A) calling for the payment of taxes and the treatment thereof as expenses of sale. This case is not similar to the present case, except that it was a mortgage foreclosure action.

Conclusion

The decision below is correct. It is not in conflict with the decision in United States vs. New Britain (347 U. S. 81). It is in conformity with the decision in United States vs. Brosnan (363 U. S. 237). It does not impede the United States in any legitimate attempts to collect its tax liens. It is a statement by the highest New York Court of its interpretation of New York laws. It states New York practice. It defines New York property rights. It has no general application outside of New York State. It is not in conflict with any federal statute, or federal court decision.

It is therefore respectfully submitted that the petition for certiorari should be denied.

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May, 1962.

Appendix A

Sections 3670, 3671 and 3672 of Title 26 United States Code, 1952 Edition, are printed as Appendix "B" at pages 40 and 41 of the petition for writ of certiorari in this matter.

* * *

New York Civil Practice Act:

SEC. 1082. *Final judgment; surplus moneys.*

1. In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action except as provided in subdivision two of this section. All surplus moneys arising from the sale of mortgaged premises under any judgment shall be deposited by the officer appointed to conduct the sale of the premises within five days after the same shall be received and be ascertainable to the credit of the action in a bank or trust company named by the court in the final judgment unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are made specially by the court. Any person claiming the surplus moneys arising upon the sale of mortgaged premises, or any part thereof, either in his own name or by his attorney at any time before the confirmation of the report of sale, may file with the clerk in whose office the report of sale is filed a written notice of such claim, stating therein the nature and extent of his claim and the address of himself or his attorney. A motion to confirm such report of sale shall not be made within three months after the filing of the report and shall in any event be made not later than four months after the filing of such report, except that if there be no surplus moneys arising from the sale of the mortgaged premises under such judgment,

any application for confirmation of the report of sale may be made at any time after the report shall have been filed eight days. Where the report of sale shows surplus money the party moving for confirmation of the report of sale shall present with his motion papers a proper voucher for the surplus moneys showing that they have been paid over, deposited or disposed of in pursuance of the judgment, a certificate of the clerk specifying the notices of claim to the surplus moneys, if any, so filed with him, and an affidavit showing any other unsatisfied lien on the property. Where it appears to the court, on such motion for confirmation of the report of sale, that the owner of the equity of redemption in the action is entitled to all of the surplus moneys, and is the only person claiming the same, it may order that such surplus moneys shall be paid over to such owner or his assigns by the officer appointed to conduct the sale of the premises, without further proceedings. Where it appears on such motion that the owner is not the only person claiming such surplus, the court shall direct the sheriff or referee making the sale, within five days after such order is made, to pay such surplus moneys in the city of New York to the treasurer of the said city, and in other counties outside of the city of New York, to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court. In case of the death, disability, or removal of the officer appointed to conduct the sale of the premises, the court may grant an order authorizing the bank or trust company in which such surplus moneys are deposited to pay them over to the person or persons entitled thereto.

Sec. 1087. *Payment of taxes, assessments and water rates out of proceeds of sale.*

Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs

all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article. The provisions of this section shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder.

* * *

Title 28 United States Code:

SEC. 1652. *State laws as rules of decision.*

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

* * *

Title 28 United States Code:

SEC. 2410. *Actions affecting property on which United States has lien.*

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made

to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

* * *

New York Real Property Law:

SEC. 240. *Definitions and use of terms.*

2. The term "conveyance", as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered.

SEC. 290. *Definitions; effect of article.*

3. The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title of any real property may be affected, including any instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

* * *

Appendix A

SECTION 1626 of the Code of Civil Procedure of the State of New York, predecessor to Section 1082 of the New York Civil Practice Act, as adopted by Chapter 178 of New York Laws of 1880:

> In an action to foreclose a mortgage upon real property, if the plaintiff become entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.

SECTION 1676 of the Code of Civil Procedure of the State of New York, predecessor to Section 1087 of the New York Civil Practice Act, as adopted by Chapter 178 of New York Laws of 1880:

> Where a judgment, rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute. The sums, necessary to make those payments and redemptions, are deemed expenses of the sale, within the meaning of that expression, as used in any provision of article second, third, or fourth of this title.
>
> * * *

General Statutes of Connecticut:

TITLE 49, CHAPTER 846.

SEC. 49-27. *Disposal of proceeds of sale.*

> The proceeds of each such sale shall be brought into court, there to be applied if the sale is ratified, in

accordance with the provisions of a supplemental judgment then to be rendered in such cause, specifying the parties who are entitled to the same and the amount to which each is entitled; and, if any part of the debt or obligation secured by the mortgage or lien foreclosed or by any subsequent mortgage or lien was not payable at the date of the judgment of foreclosure, it shall nevertheless be paid as far as may be out of such proceeds as if due and payable, with rebate of interest where such debt was payable without interest, provided, if the plaintiff is the purchaser at any such sale, he shall be required to bring into court only so much of such proceeds as exceed the amount due upon his judgment debt, interest and costs. (1949 Rev., S. 7208.)

SEC. 49-29. *Expenses of sale and costs.*

The court shall order the judgment and costs of the plaintiff to be first paid out of the proceeds of such sale and shall allow, to such of the parties as receive the balance of such proceeds, the costs usually allowed to successful parties, which costs shall be paid in addition to their respective claims and in the same order. (1949 Rev., S. 7210.)

* * *

Wisconsin Statutes:

CHAPTER 287.10. *Foreclosure.*

(1) If the plaintiff recovers the judgment shall describe the mortgaged premises and fix the amount of the mortgage debt then due and also the amount of each instalment thereafter to become due, and the time when it will become due, and whether the mortgaged premises can be sold in parcels and whether any part thereof is a homestead, and shall adjudge that the mortgaged premises be sold for the payment of the amount then due and of all instalments which shall become due before the sale, or so much thereof as may be sold separately without material injury to

the parties interested, and be sufficient to pay such principal, interest and costs; and when demanded in the complaint, direct that judgment shall be rendered for any deficiency against the parties personally liable and, if the sale is to be by referee, he must be named therein.

(2) Any party may become a purchaser. But no such sale shall be made or advertised until the expiration of one year from the date when such judgment is entered; and when judgment is for instalments due and to become due, and payment shall be made within the year, of the instalments found due at the date of the judgment, with interest and costs, no sale shall be made or advertised upon any instalment growing due after the date of the judgment until one year after the same shall become due; but in all cases the parties may, by stipulation, filed with the clerk, consent to an earlier sale. Sales under foreclosure of mortgages given by any railroad corporation may be made immediately after the rendition of the judgment.

(3) The proceeds of every sale shall be applied to the discharge of the debt adjudged to be due and the costs awarded; and if there shall be any surplus it shall be subject to the order of the court. If any surplus remains in the court for three months, without being applied for, the court shall direct the same to be put out at interest for the benefit of the party entitled thereto to be paid to him upon the order of such court.

(4) The court may order in the judgment of foreclosure that all sums advanced by the plaintiff for insurance, necessary repairs and taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof.

* * *

Appendix A

House of Representatives Report 95, 71st Congress, 2nd Session:

TO PERMIT THE UNITED STATES TO BE MADE A PARTY DEFENDANT IN CERTAIN CASES.

December 21, 1929 Referred to the House Calendar and ordered to be printed

Mr. Graham, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 980)

The Committee on the Judiciary, to whom was referred the bill H. R. 980, after consideration reports the same favorably and recommends that the bill do pass.

This bill is identical with the bill H. R. 13981, which was favorably reported by this committee in the Seventieth Congress and passed the House by unanimous consent.

This legislation has been recommended for a number of years by the American Bar Association through its committee on removal of Government liens on real estate, the United States League of Local Building and Loan Associations, and by numerous land title companies, in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances the mortgagee find himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He cannot remove the lien as there is no method by which he

may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment.

The purpose of this bill is to provide a simple and just method of proceeding in such cases, one which is fair to the holder of the prior lien on the real estate and which amply and fully protects the rights of the Federal Government.